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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. ~~1198~~ 115

CARROLL DUNSCOMBE,
Petitioner,

vs.

BESSIE F. SAYLE, As Executrix of the Estate of Harold D. Sayle, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Carroll Dunscombe, a citizen and resident of the State of Florida, prays for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (1) to review the judgment of that court, entered January 13, 1965, dismissing Petitioner's appeal to that Court as frivolous and fining him for taking what the Court called a frivolous appeal (R. 43) and (2) to review the Order of that Court denying Petitioner's Petition for Rehearing, entered February 9, 1965 (R. 42).

JUDGMENT AND ORDER APPEALED FROM

On March 6, 1964, the United States District Court for Southern District of Florida, without a hearing, dismissed, without prejudice, Petitioner's Complaint in that Court, for lack of jurisdiction (R. 27).

Appeal from the Order of dismissal was taken by Petitioner to the United States Court of Appeals for the Fifth Circuit (R. 31), on the grounds that such Order violated Petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution (R. 33, 34).

At the hearing January 4, 1965, on that Appeal, the Order of dismissal was affirmed from the Bench (R. 42), and on January 13, 1965, the Court of Appeals entered the following judgment (R. 43):

> "Per Curiam: As announced from the bench the Appeal is DISMISSED. It is patently a frivolous appeal. Double costs are awarded the Appellees as authorized by 28 U.S.C. 1912."

Petition for Rehearing was denied by Order entered February 9, 1965 (R. 72).

JURISDICTION OF THIS COURT

This Court has jurisdiction to review on certiorari the aforementioned Judgment of January 4, 1965, and aforementioned Order of February 9, 1965, of the Court of Appeals, under authorization in Section 1254, Title 28, United States Code.

STATEMENT OF QUESTIONS FOR REVIEW

1. Can a United States District Court dismiss, without a hearing, a Complaint alleging that the Plaintiff therein has been deprived of his property by a State Court without due process of law and in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2. If one is deprived of his property by a State Court without due process of law and in violation of the Section 1 of the Fourteenth Amendment to the United States Constitution, is diversity of citizenship, or any amount involved, required to give the Federal Court jurisdiction, in view of the provisions of Article III, Section 2, Clause 1, of the United States Constitution, and of the implementing Sections 1331 and 1343 (3), Title 28, United States Code, and Sections 1981 and 1983, Title 42, United States Code?

3. Is an appeal frivolous when taken from a judgment dismissing without a hearing a Complaint alleging that the Plaintiff therein has been convicted of a serious criminal offense, and deprived of his property, by a State Court, without the due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

4. Can a United States Court of Appeals assess damages against an appellant when his appeal is dismissed by that Court?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, Clause 1, of the United States Constitution.

The Fifth and Fourteenth Amendments to the United States Constitution.

Sections 1254 (1), 1912, 1331, 1343 (3), Title 28, United States Code.

Sections 1981 and 1983, Title 42, United States Code.

Rule 15, Federal Rules of Civil Procedure.

Florida Statutes as follows: Section 62.28 of 1931 Statutes (in force when the foreclosure action was filed), requiring a Complaint to be verified if interlocutory relief was sought; Section 733.16 of Statutes 1963 requiring claims against an estate to be filed within 6 months after first publication of Notice to Creditors; Section 733.18 of Statutes 1963, allowing one who has filed a claim against an estate, and to which objections have been filed, two calendar months to file suit to prove his claim.

Article 16, Section 21, Florida Constitution; as follows:

> "A certified copy of the record of any deed or mortgage that has been or shall be duly recorded according to law shall be admitted as prima facie evidence thereof, and of its due execution with like effect as the original duly proved; provided that the original is not within the custody or control of the party offering such copy."

Section 12, Florida Bill of Rights, forbids a person being deprived of his property without due process of law.

STATEMENT OF THE CASE

Petitioner paid a $10,000.00 mortgage in the depths of the depression in 1931, by the conveyance of property (R. 4, 16). The banks were closed (R. 4, 16). The mortgagee, the father of deceased Administrator of his estate, satis-

fied the mortgage but failed to return the mortgage or note, as he claimed to have lost or mislaid them (R. 15, 16). He died some time thereafter. Shortly before the Statute of Limitations would have barred the claim, the Administrator of the decedent filed suit to foreclose the mortgage, although a satisfaction of the mortgage had been of record for five years (R. 3, 14, 15).

The Administrator made no attack on the recorded mortgage satisfaction (R. 3, 15). If fraud were claimed, he would have had to bring his suit within three years and return all the property that had been received in payment (R. 3, 15). If interlocutory relief by cancellation of the recorded satisfaction were asked, which was not, the Complaint would have to be sworn to. Reformation of the description in the mortgage of the property therein secured was not asked (R. 3, 15).

The trial came on at Stuart, Martin County, Florida, in the Court for that County (R. 2, 14).

As indicated above, the Complaint of the Administrator made no attack on the recorded mortgage satisfaction. It asked for no interlocutory relief by cancellation, was not sworn to, was never amended (R. 3, 15), and hence there was no issue as to the validity of the recorded mortgage satisfaction.

The defendant (Petitioner) pleaded payment and satisfaction of the mortgage, and exhibited paid cancelled checks to the mortgagee (R. 3, 4, 15, 16), and offered in evidence the certified copy of the recorded mortgage satisfaction (R. 4, 16), and accounted for the loss of the original of the satisfaction (R. 4, 16), under the provisions of Article 16, Section 21, of the Florida Constitution, as follows:

> A certified copy of any deed or mortgage that has been or shall be duly recorded according to law shall be

admitted as prima facie evidence thereof and of its due execution, provided that the original is not in the control or custody of the party offering it.

Petitioner also offered the deeds, and testimony, to show that when the $10,000.00 fell due in the depths of the depression in 1931, and banks closed, an accord and satisfaction had been reached, and the note paid by conveyance of real property and a mortgage (R. 4, 16). Confronted with such testimony as to how the debt had been paid, Plaintiff in that suit then admitted that the decedent had received the payment during his lifetime, but contended that it was for another debt (R. 4, 5, 16). Accordingly the burden shifted to the Plaintiff to prove that there was such other debt, and that the admitted payments had been applied to it, but no attempt was made for such proof, as there was no other debt (R. 5, 16). Therefore, it was in effect admitted that the mortgage and interest thereon had been paid to the holder during his lifetime, and the mortgage satisfaction executed and delivered, in recognition (R. 5, 16).

Toward the close of the trial, the Plaintiff's attorney offered in evidence an unidentified composite photostat, and so attempted to make it appear that the recorded mortgage satisfaction had been materially altered by the defendant (Petitioner) after its execution and before its recording (R. 5, 17). The witnesses and the notary for the satisfaction were not called to testify (R. 6, 17). Moreover, there could not have been any material alteration of the satisfaction of a paid mortgage (R. 6, 17).

Although as above stated there had been no attack on the recorded mortgage satisfaction, or prayer for such relief as cancellation, or verified Complaint (R. 6, 17), the trial Judge convicted the defendant (Petitioner) of

a felony with which he had never been charged (R. 6, 17, 18), holding that the defendant had materially altered the recorded mortgage satisfaction, and he ordered the satisfaction cancelled of record, and the mortgage foreclosed, thereby depriving Petitioner of his property without due process of law (R. 6, 17, 18). The Florida Supreme Court on Defendant's appeal affirmed, without an opinion, and later fined Defendant (Petitioner) (*Dunscombe* v. *Sayle,* 135 So.2d 224), and the decedent's Administrator thereafter had Petitioner and his wife forcibly evicted from their home to enforce the Judgment, and caused loss and damage to the contents of their home, and expense for storage and transportation (R. 8).

Thereafter, the Administrator having died, Petitioner lodged claim against his estate for damages of $250,000.00, and costs (R. 14-25), and when the claim was rejected (R. 25, 26), filed timely suit in the United States District Court for the Southern District of Florida (R. 1-13), to prove his claim. However, that Court on its own motion, and without a hearing, dismissed the suit, without prejudice (R. 27), the order of dismissal giving no reason therefor other than lack of jurisdiction (R. 27).

As hereinabove stated, Petitioner's Appeal from such Order to the United States Court of Appeals for the Fifth Circuit was dismissed as being frivolous, and double costs awarded to the Appellee (R. 43).

STATEMENT OF EVIDENCE IN THE CASE

There was no opportunity to offer any in the United States District Court or in the Court of Appeals.

GROUNDS FOR JURISDICTION OF THIS COURT

As stated hereinabove, the County Court for Martin County, Florida, entered a decree of foreclosure against Petitioner's property, although the question was not before the Court, nor raised or pleaded in the Complaint, and hence was not in issue, the Court's action having been based on a composite photostat introduced for the plaintiff purporting to show that the defendant (Petitioner) had materially altered the mortgage satisfaction after its execution, and before its recording (R. 5, 6, 17, 18). Petitioner has contended that the Order for foreclosure therefore was void, and that he was deprived of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the United States Constitution (R. 11, 17, 33, 46, 56).

Timely suit to prove his rejected claim for damages in enforcing a Judgment obtained without due process of law was filed by Petitioner in the United States District Court for the Southern District of Florida, but that Court on March 26, 1964, dismissed the suit on its own motion and without a hearing (R. 27, 28), such action having been alleged to be contrary to the provisions for due process of law provided for in the Fifth and Fourteenth Amendments to the United States Constitution (R. 33, 34).

Also, as stated hereinabove, the United States Court of Appeals for the Fifth Circuit on January 13, 1965 (R. 43), dismissed as frivolous Petitioner's Appeal from the Order dated March 26, 1964, and assessed double costs against him, and on February 9, 1965, denied rehearing (R. 73), the Court's such actions being stated as having contravened Petitioner's rights under the above Fifth Amendment.

This Court has jurisdiction to review the Orders of the Court of Appeals, under Title 28, Section 1254(1), United States Code.

Title 28, Section 1912, United States Code, referred to in the Order entered January 13, 1965 (R. 43), was not enacted to inhibit an appeal from what is considered to be an unsound Judgment.

Petitioner did not seek review by this Court of the Judgment of the Florida Supreme Court heretofore referred to, because he believed that no appeal lay from a decision which simply affirmed a void Judgment, as the decision would itself also be void. Having exhausted his remedies in the State Courts, Petitioner concluded that his only redress was in recourse to the Federal Courts, under the above cited provisions of the United States Constitution and Federal Statutes.

ARGUMENT

(a)

A United States District Court cannot dismiss, without a hearing, a Complaint alleging that the Plaintiff has been deprived of his property by a State Court without due process of law and in violation of the Fourteenth Amendment to the United States Constitution.

The United States District Court for the Southern District of Florida summarily and on its own motion entered an Order dismissing Petitioner's suit, on the ground that it had no jurisdiction (R. 27).

Section 11 of the Florida Bill of Rights preserved the right to a trial by jury, due process requiring that one be charged, and that he be allowed to defend against the charge, and to confront the witnesses. Petitioner was tried without a jury, and convicted by the State Court of a crime not charged, and without opportunity to defend, and his property taken by order for cancellation of the recorded mortgage satisfaction, and for foreclosure of the mortgage,

being thereby denied due process of law. *Crain* v. *United States*, 162 U.S. 625, 40 L. Ed. 1097.

> "Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent 'the party who brings the suit is master to decide what law he will rely upon . . .' and does determine whether he will bring 'a suit arising under the . . . [Constitution or laws] of the United States by his declaration or bill'. Jurisdiction is not defeated . . . by the possibility that the averment might fail to state a cause of action on which petitioner could actually recover. For it is well settled that a failure to state a proper cause of action calls for a judgment on the merits and not a dismissal for lack of jurisdiction. Whether the Complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the Court has assumed jurisdiction over the controversy. . . . It is the established practice of this Court to sustain the jurisdiction of Federal Courts to issue injunctions to protect rights safeguarded by the Constitution, and to restrain individual State officers from doing what the 14th Amendment forbids the State to do." *Bell* v. *Hood*, 327 U.S. 678, 681, 682, 684.

> "How a suit shall be begun, whether by writ or informal notice, is a question of practice of the State or of its form and modes of procedure. The Constitution of the United States does not attempt to make a choice between one method and another. It provides only that the method employed 'gives reasonable notice and affords fair opportunity to be heard before the issues are determined'." *Chisholm* v. *Gilmer*, 299 U.S. 99, 102, 57 S. Ct. 65.

A Federal Court can dismiss a Complaint if it discovers that the Complaint is defective in the showing as to jurisdiction, but if after hearing it appears that the jurisdictional

statement can be amended, such amendment should be allowed. *Smith* v. *McCullough*, 270 U.S. 456, 460, 70 L. Ed. 682, 46 S. Ct. 338.

Rule 15(a) of the Federal Rules of Civil Procedure provides for amendment of pleadings if they are deficient.

In the instant matter, the United States District Court could have required the Plaintiff (Petitioner) to produce the record in the foreclosure suit, to ascertain whether the State Court ever had jurisdiction of the subject matter on which the Judgment was predicated.

(b)

If one is deprived of his property by a State Court without due process of law, and in violation of the First Clause of the Fourteenth Amendment to the United States Constitution, neither diversity of citizenship, nor any amount involved, is required to give the Federal Court jurisdiction, in view of Article III, Section 2, Clause 1, of the United States Constitution, and of the implementing Sections 1331 and 1343 (3), Title 28, United States Code, and Sections 1981 and 1983, Title 42, United States Code.

Under the Section 1331, Title 28, United States District Courts have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Under the Section 1343, Title 28, United States District Courts have original jurisdiction where a State had deprived a person of due process of law.

Neither diversity of citizenship nor amount in controversy is a prerequisite for Federal Court jurisdiction asserted under Section 1983, Title 42, United States Code. *Ortega* v. *Ragen*, (1954) 216 F.2d 561, certiorari denied 75 S. Ct. 786, 349 U.S. 940, 90 L. Ed. 1268. See also *Bat-*

tone v. *Lindsley et al.*, 170 F.2d 705; *Glicker* v. *Michigan Liquor Control Commission*, 160 F.2d 96.

Under Florida Statutes, torts of a deceased survive his death, and claims therefore can be filed against his estate. *Waller* v. *First Savings & Trust*, 138 So. 780, 103 Fla. 1024.

(c)

An appeal is not frivolous when taken from an Order dismissing without a hearing a Complaint alleging that the Plaintiff therein had been deprived of his property by a State Court without due process of law.

The Complaint filed by Petitioner in the United States District Court for the Southern District of Florida is carried in the record, pages 1-13. As will be noted, the jurisdiction of the Court was invoked at the outset (R. 1) under the provisions of the Fifth and Fourteenth Amendments to the United States Constitution, in that "Plaintiff was tried and convicted of a felony with which he was never charged, and his property taken without due process of law, by the Florida Court and officials thereof". Damages of $250,000.00 were claimed in the Complaint (R. 13), which more than satisfied the jurisdictional requirement for amount involved.

Notwithstanding, the Court, on its own motion, and without a hearing, summarily dismissed the Complaint, without prejudice, for lack of jurisdiction (R. 27).

As Points on his Appeal to the United States Court of Appeals for the Fifth Circuit, Appellant (Petitioner) urged that (1) the United States District Court had "no summary jurisdiction to dismiss the Complaint without hearing, on its own motion", (2) the Complaint showed on its face that the "Plaintiff had been deprived of his rights guaranteed under the 5th and 14th Amendments of the United States Constitution, by the State Courts of Florida",

(3) the Plaintiff had exhausted all remedy to have the "void Judgment and proceedings based thereon vacated by the State Courts of Florida", (4) the Complaint showed that both the State and Constitutional rights of Plaintiff (Petitioner) had been violated by the State Courts of Florida "in that he had been tried and convicted of a serious criminal offense without a jury, in a County where the crime was not alleged to have been committed and without being advised of what offense he was claimed to have committed, as the Fifth Amendment to the United States Constitution [13] provided", (5) "Plaintiff's Constitutional right of due process of law guaranteed under the 14th Amendment has been violated and he has been deprived of his property without due process of law by the State Courts of Florida", (6) "the proceedings in the Federal District Court have deprived the Plaintiff of due process of law and his right to be heard" (R. 33, 34).

The action of the Court of Appeals in characterizing as frivolous an appeal predicated on the foregoing basic Points, and then dismissing the Appeal, with assessment of double costs against the Appellant, appears violative of the provisions of the Fifth Amendment to the United States Constitution, and should have this Court's review.

> "An appeal will not be dismissed as frivolous or taken merely for delay where examination shows that it presents a debatable, justiciable, or substantial question, where the questions raised necessitate an examination of the entire record, or where the appeal is taken from a void order." 5 *C.J.S.*, #1358, pages 438, 439 (Appeal and Error), citing numerous decisions in the footnote.
>
> "We cannot dismiss a case on motion simply because we may be of the opinion that it has been brought here for delay only. Both parties have the right to be heard on the merits, and one cannot require the other to come

to such a hearing upon a mere motion to dismiss. To dismiss under such circumstances would be to decide that the case had no merits." *Amory* v. *Amory et al.*, 91 U.S. 356, 357, 23 L. Ed. 436.

The earnestness and confidence with which an appeal is argued may show that the appeal was not frivolous and for delay. *Sullivan, Long, and Haggerty* v. *Washington*, 128 F.2d 466; *Atlantic Coast Line* v. *McKinley*, 84 F.2d 33; *Shevlin-Hixon Co.* v. *Smith*, 165 F.2d 170.

The record herein, 1-74, clearly shows the earnestness and confidence with which the Petitioner presented his appeal before the Court of Appeals.

(d)

An Appellate Court cannot assess damages against an Appellant when his Appeal is dismissed.

Title 28, Section 1912, United States Code, relied upon by the Court of Appeals in assessing double costs against Appellant (Petitioner) (R. 43), does not provide for damages on dismissal of an appeal but only on affirmance of the judgment appealed from.

The Section is as follows:

"DAMAGES FOR COSTS *ON AFFIRMANCE.*

"*Where a judgment is affirmed* by the Supreme Court or by a Court of Appeals, the Court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs. June 25, 1948, c. 646, 62 Stat. 954." (Emphasis supplied)

It was held in *McDonald* v. *Winfield Corporation*, 104 F. Supp. 609 (1952), in referring to the above Statute, that when a judgment *is affirmed*, the Appellate Court has discretion to award damages in the nature of a penalty, and if the Appellate Court does not award such damages, the

lower Court may not do so. See also *Lowe* v. *Willacy*, 239 F.2d 179 (1956).

A plaintiff whose Complaint has been dismissed by a lower Court without a hearing can gain no benefit by the delay of an appeal, nor can the defendant be damaged thereby, and the imposition of a penalty upon an appellant whose appeal is dismissed is an abuse of discretion, and inhibits those who consider that they have valid grounds for appealing from doing so.

Wherefore it is prayed that this Petition for Certiorari be granted, and that the United States Court of Appeals for the Fifth Circuit be required to certify and send to this Court the full transcript of proceedings in *Carroll Dunscombe, Appellant,* v. *Bessie F. Sayles, Executrix, Appellee,* Case No. 21592, for review by this Court of that Court's Orders of January 13, 1965 (R. 43), and of February 9, 1965 (R. 72).

Respectfully submitted,

John Wattam

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